United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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CLAIRDALE ENTERPRISES, INC.,

Plaintiff-Appellant,

-against-

C. I. REALTY INVESTORS, PETER C. R. HUANG, JAMES V. TOMAI, JR., WILLIAM M. HEALEY, JOHN L. GIBBONS, DANIEL E. LYONS, ROBERT M. MORGAN, WILLIAM S. RENCHARD, STEPHEN RUSSELL, GEORGE T. SCHARFFENBERGER, FRED R. SULLIVAN, JAMES R. WEBB, CITY INVESTING COMPANY and C. I. PLANNING CORPORATION,

Defendants-Appellees.

Docket No. 75-7499

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DEFENDANTS-APPELLEES' BRIEF IN OPPOSITION TO PLAINTIFF-APPELLANT'S MOTION FOR A STAY PENDING APPEAL

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CLAIRDALE ENTERPRISES, INC., Plaintiff-Appellant, -against- C. I. REALTY INVESTORS, PETER C. R. HUANG, JAMES V. TOMAI, JR., WILLIAM M. HEALEY, JOHN L. GIBBONS, DANIEL E. LYONS, ROBERT M. MORGAN, WILLIAM S. RENCHARD, STEPHEN RUSSELL, GEORGE T. SCHARFFENBERGER, FRED R. SULLIVAN, JAMES R. WEBB, CITY INVESTING COMPANY and C. I. PLANNING CORPORATION, Defendants-Appellees.	:	Docket No. 75-7499

DEFENDANTS-APPELLEES' BRIEF IN OPPOSITION TO PLAINTIFF-APPELLANT'S MOTION FOR A STAY PENDING APPEAL

Defendants-Appellees respectfully submit this short brief in opposition to plaintiff's motion for preliminary injunction pending appeal enjoining the holding of the annual meeting of C.I. Realty Investors ("CIRI") scheduled for today, September 4, 1975, at 10:00 a.m.* The sole purpose of this annual meeting is for the election

* Pursuant to the request of the Clerk yesterday this meeting is being adjourned on an hourly basis to allow this application to be heard.

of nine trustees and to consider and vote upon the appointment of Peat, Marwick, Mitchell & Co. as auditors. On September 3, 1975 the Hon. Richard Owen denied plaintiff-appellant's motion for a preliminary injunction brought on by order to show cause on August 26, 1975

Plaintiff-appellant alleges, inter alia, that CIRI's August 4, 1975 Proxy Statement and Interim Report are false and misleading. Defendants-appellees' detailed responses to these charges are contained in the affidavits of Richard E. Nolan and James V. Tomai, Jr. (documents six and seven in Appellant's Appendix) and are supported by Judge Owen's opinion. (Attached hereto for this Court's convenience). Judge Owen did not abuse his discretion in denying either the preliminary injunction motion or the stay pending appeal. There is no reason for this Court to enjoin the annual meeting pending appeal - and give plaintiff-appellant the very relief it was denied below.

JUDGE OWEN DID NOT ABUSE HIS DISCRETION IN DENYING THE PRELIMINARY INJUNCTION MOTION

This Court has repeatedly stated that it will not reverse a District Court's denial of a preliminary injunction motion absent an abuse of discretion. In Chris-Craft Industries, Inc. v. Piper Aircraft Corporation, 480 F.2d 341, 394 (2d Cir.), cert. denied, 414 U.S. 910 (1973), this Court stated as follows:

> "Specifically, the test for review of the denial of injunctive relief is whether there has been an abuse of discretion. See United States v. W. T. Grant Co., 345 U.S. 629, 633, 634, 73 S. Ct. 894, 97 L.Ed. 1303 (1953). In United States v. W. T. Grant Co. the Supreme Court said that for reversal "the Government must demonstrate that there was no reasonable basis for the District Judge's decision." 345 U.S. at 634, 73 S.Ct. at 898. And this Court has recognized that this rigorous limitation on appellate review applies to SEC actions for injunctive relief as well. As was said in SEC v. Manor Nursing Centers Inc., 458 F.2d 1082, 1100 (2 Cir. 1972), "the party seeking to overturn the district court's exercise of discretion has the burden of 'showing that the court abused that discretion, and the burden necessarily is a heavy one.' SEC v. Culpepper, supra, 270 F.2d [241] at 250; United States v. W. T. Grant Co., 345 U.S. 629, 633 [73 S.Ct. 894, 97 L. Ed. 1303] (1953)."

See also, Stark v. New York Stock Exchange, 466 F.2d 743 (2d Cir. 1972); 601 West 26 Corp. v. Solitron Devices Inc., 420 F.2d 293 (2d Cir. 1969).

Judge Owen issued his opinion after reviewing the extensive papers submitted to him on behalf of the parties and hearing oral argument. He denied plaintiff-appellant's motion after finding that it had failed to show (1) probable success on the merits, (2) a possibility of irreparable injury and (3) that the balance of hardship tipped sharply in it's favor (Op. pp. 3-4). Judge Owen further held that plaintiff inexcusably delayed filing this action until the eve of the annual meeting (Op. p. 5) and had ample time to mail its proxy materials to CIRI's shareholders but declined to do so (Op. p. 4). There is nothing

to demonstrate that he abused his discretion in so holding. This Court should not enjoin the annual meeting and render a decision which would be construed as a finding of wrongdoing by management - an irreparable injury that Judge Owen found would occur. (Op. pp. 4-5) (See also Defendant's Brief below, pp. 7-9, Document 8 in Appellant's Appendix).

The citation of Cooke v. Teleprompter Corp., [1971-1972 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 93,283 (S.D.N.Y. 1971), in Mr. Lesch's affidavit in support of this motion, par. 8, does nothing to alter the validity of Judge Owen's decision. In Cooke, Judge Brieant decided on facts quite different from those present here that a preliminary injunction was appropriate. Judge Brieant found that the proxy statement was false and misleading, that plaintiff did not have an adequate opportunity to communicate with fellow shareholders, and that plaintiff had moved with all possible speed to commence the action. Judge Owen specifically denied that any of these factors were present here.

CONCLUSION

Plaintiff-appellant's application for an injunction pending appeal should be denied in all respects.

Dated: New York, New York
September 4, 1975

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CLAIRDALE ENTERPRISES, INC., Plaintiff, -against- C.I. REALTY INVESTORS, PETER C. R. HUANG, JAMES V. TOMAI, JR., WILLIAM M. HEALEY, JOHN L. GIBBONS, DANIEL E. LYONS, ROBERT M. MORGAN, WILLIAM S. RENCHARD, STEPHEN RUSSELL, GEORGE T. SCHARFFENBERGER, FRED R. SULLIVAN, JAMES R. WEBB, CITY INVESTING COMPANY and C.I. PLANNING CORPORATION, Defendants.	75 Civ. 4227 OPINION AND ORDER

OWEN, District Judge.

Plaintiff moves for a preliminary injunction enjoining the defendants from holding the 1975 annual meeting of C.I. Realty Investors ("CIRI") scheduled for September 4, 1975 until corrected proxy materials allegedly free of material misrepresentations and containing presently omitted material disclosures, can be mailed to all shareholders, and for related relief. The motion is denied for the reasons set forth in abbreviated form herein given the time limitation imposed on the Court by the extreme lateness of the plaintiff's application.

Plaintiff's grounds for the injunction in essence are that the proxy materials failed to adequately disclose (1) that earlier litigation by the same plaintiff allegedly resulted in a merger of CIRI and one Celadon Corporation being abandoned; (2) that an SEC investigation presently pending of CIRI was an outgrowth of the plaintiff's endeavors and the Court action mentioned above; (3) that the annual meeting had already been postponed because of certain other litigation by plaintiff to obtain a stockholders list in which it was successful, and that the trustees were thereby kept in office beyond the normal time; (4) that $900,000 of corporate waste was committed in connection with the abandoned merger with Celadon and defending against the plaintiff's action/effecting that result; (5) that two former trustees had been members of affiliated corporations and, therefore, their service was in violation of the Declaration of Trust of CIRI; (6) that a conflict of interest existed between one Sullivan, a trustee of CIRI who was also a trustee of the Howard Savings Bank, both lenders to the builders of an apartment complex, resulting in CIRI's earlier mortgage being subordinated to the later mortgage of the Howard Savings Bank; (7) finally, that CIRI wrongfully carries certain property on the books at cost less depreciation whereas it should be written down sharply, and has failed to establish an adequate reserve for losses which result in a misleadingly rosy financial picture for CIRI.

The standards governing a Trial Court's issuing a preliminary injunction in such a situation are well established in such cases as American Brands, Inc. v. Playgirl, Inc., 498 F.2d 947 (2d Cir. 1974) and D-Z Investment Company v. Holloway, et al, CCH Fed. Sec. L. Rep. ¶94,588 (S.D.N.Y. 1974). However, I am far from persuaded that the plaintiff has shown either probably success on the merits or the possibility of irreparable injury, and while there are questions going to the merits, I do not find the tipping of the balance of hardships sharply in plaintiff's favor.

As to plaintiff's grounds #s 1 and 2, the proxy statement does reveal both the fact of the plaintiff's earlier action and the fact of the SEC's investigation all of which would put a reader on notice of issues in this area. As to plaintiff's ground #3, I am unable to ascertain why this omitted fact would justify postponement of the meeting to elect trustees for a new term. As to plaintiff's ground #4 I am not sufficiently persuaded on the merits of the claim of "waste" as to be moved to grant the relief requested, even assuming other factors were met. As to plaintiff's ground #5, the two trustees in question, apparently men of stature, resigned upon the discovery of their disability. Defendant contends this claim is a technical one and I am not persuaded otherwise. As to claim #6, it appears that it was always contemplated by

contract that CIRI's construction loan was to be eventually subordinated to permanent mortgage loans when obtained. As to plaintiff's claim #7, the failure to write down certain assets and to provide adequate reserves for loans, even were it true, does not justify the preliminary relief sought. I am fortified in my ultimate conclusion by the fact that the SEC approved CIRI's proxy materials herein and that plaintiff had the opportunity to obtain timely clearance of its own proxy materials from the SEC and failed to do so. There is no question that plaintiff could have mailed its proxy materials to the shareholders of CIRI in good time upon receipt of the shareholders list in July. It did not do so. It should be noted that the Massachusetts Court in ordering the turn-over of the stockholder's list also ordered a delay of the stockholders meeting for 45 days to allow plaintiff time to mail any desired materials. CIRI honored the 45 day delay order but plaintiff did not act.

Added to all the foregoing, is the fact that if the shareholders meeting goes forward, and if plaintiff hereafter demonstrates that the proxies were unlawfully obtained and utilized, the results of the annual meeting may then be set aside, the proxies resolicited and a new vote held.

Also, given the apparent lack of strength of plaintiff's position, I am reluctant to inflict possibly irreparable injury on defendant CIRI by appearing to make a favorable

decision on plaintiff's behalf which some would construe as a finding of wrongdoing on the part of present management. Sherman v. Posner, 266 F.Supp. 871 (S.D.N.Y. 1966).

Finally I should note that the plaintiff's order to show cause herein was filed with this Court on August 27, 1975 and came on to be heard before me on August 29, with the shareholders meeting sought to be enjoined being held on September 4, only six days later. Plaintiff received CIRI's proxy materials in early August. There is no decent explanation of why it waited three weeks and then, on the eve of the meeting, first proceeded. This, too, is a ground for denial of the extraordinary relief sought. McConnell v. Lucht, 320 F.Supp. 1162 (S.D.N.Y. 1970).

Accordingly, and for all of the reasons stated above, plaintiff's motion for preliminary injunction is denied.

SO ORDERED:

United States District Judge

September 3, 1975

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CLAIRDALE ENTERPRISES, INC., Docket 75-7499

Plaintiff-Appellant,

against

C. I. REALTY INVESTORS, PETER C. R. HUANG, JAMES V. TOMAI, JR., WILLIAM M. HEALEY, JOHN L. GIBBONS, DANIEL E. LYONS, ROBERT M. MORGAN, WILLIAM S. RENCHARD, STEPHEN RUSSELL, GEORGE T. SCHARFFENBERGER, FRED R. SULLIVAN, JAMES R. WEBB, CITY INVESTING COMPANY and C. I. PLANNING CORPORATION,

NOTICE OF MOTION FOR PRELIMINARY INJUNCTION PENDING APPEAL AND OTHER RELIEF

Defendants-Appellees.

The hearing of the within motion has been set for Thursday, September 4, 1975 before the Court in Room 1106 U.S. Courthouse, Foley Square, New York City. In the meantime counsel for all parties will be expected to see to it that the status quo in the action is maintained.

September 3, 1975

A. Daniel Fusaro
Clerk

S I R S :

PLEASE TAKE NOTICE that, upon the annexed affidavit of Michael Lesch, Esq., sworn to on September 3, 1975, and the appendix submitted herewith containing the papers filed below, the undersigned respectfully moves this Court on September , 1975, at a time to be designated by the Court:

(1) For an order, pursuant to Rule 8 of the Federal Rules of Appellate Procedure, preliminarily enjoining defendants, pending determination of the appeal herein

(a) from holding the 1975 Annual Meeting of C. I. Realty Investors ("CIRI") scheduled for September 4, 1975, commencing at 10 A.M., at that time or at any time before the later of (i) November 4, 1975 or (ii) a reasonable time after defendants have mailed corrected proxy materials to all shareholders of CIRI; and

(b) from voting any proxies obtained as a result of the CIRI Proxy Statement dated August 4, 1975 and the accompanying CIRI Interim Report for the period ended May 31, 1975.

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